APPENDIX A

Order of the Court of Appeals of the State of New York, dated September 12, 2002

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of September 2002

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 767

In the Matter of West 41st Street Realty LLC, et al.,
Appellants,
v.
New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In the Matter of 632 Eighth Avenue Associates, LLC,
Appellant,
v.
New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In the Matter of Romack Realty Corp.,

Appellant,

v.

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,

Respondents.

In the Matter of Three O Realty LLC,

Appellant,

v.

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,

Respondents.

The appellants having taken appeals to this Court and a motion for continuation of stay to the Court of Appeals having been made in the above causes, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeals be and the same hereby are dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for continuation of stay be and the same hereby is dismissed as academic.

/s/ STUART M. COHEN

Stuart M. Cohen

Clerk of the Court

APPENDIX B

Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 20, 2002

SUPREME COURT, APPELLATE DIVISION

First Department, April 2002

David B. Saxe, J.P.
John T. Buckley
Ernst H. Rosenberger
David Friedman
George D. Marlow, JJ.

In re Application of West 41st Street Realty LLC, et al.,
Petitioners,

-against-

938
[M-7263]

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In re Application of 632 Eighth Avenue Associates, LLC,
Petitioner,

-against-

939
[M-7234]

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In re Application of Romack Realty Corp.,
Petitioner,

-against-

940
[M-7235]

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In re Application of Three O Realty LLC,
Petitioner,

-against-

941
[M-7285]

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

x

By applications pursuant to Eminent Domain Procedure Law § 207, petitioners seek review of the determination and findings of respondent New York State Urban Development Corporation, issued on or about November 30, 2001, which directed that respondent Empire State Development Corporation exercise its power of condemnation in order to acquire, as necessary, real property designated Site 8 South within the 42nd Street Project.

Guy Miller Struve, of counsel (Rebecca L. Winters, Laura Ann Rosenbury and Lorilee A. Vaughan, on the brief, Davis Polk & Wardwell, attorneys) for petition-

ers West 41st Street Realty LLC, EMM Realty Corp. and Times Square Garage, Ltd.,

Donna-Marie Korth, of counsel (M. Allan Hyman and Edward G. McCabe, on the brief, Certilman Balin Adler & Hyman, LLP, attorneys) for petitioners 632 Eighth Avenue Associates, LLC and Romack Realty Corp.,

Mark I. Silberblatt, of counsel (Novack Burnbaum Crystal LLP, attorneys) for petitioner Three O Realty LLC,

John R. Casolaro, of counsel (Joseph M. Ryan and Susan B. Kalib, on the brief, Carter, Ledyard & Milburn, attorneys) for respondents New York State Urban Development Corporation, d/b/a Empire State Development Corporation and 42nd St. Development Project, Inc.

BUCKLEY, J.

This original proceeding, brought pursuant to Eminent Domain Procedure Law § 207, involves the well-publicized and previously litigated renovation of Times Square (*see, e.g., Jackson v New York State Urban Development Corp*, 67 NY2d 400). Specifically, six real property owners challenge a determination and findings of respondent New York State Urban Development Corporation (UDC) to authorize condemnation and acquisition of real property designated as Site 8 South comprising land across Eighth Avenue from the Port Authority Bus Terminal, a parcel which has been marked for condemnation for some time. Since we find that there is sufficient public purpose warranting respondent's determination to initiate condemnation and that petitioners have failed to

demonstrate any other legal infirmity in the UDC determination, we confirm the determination and dismiss this proceeding.

Section 207 of the Eminent Domain Procedure Law limits the scope of our review to whether: (1) the condemnation proceedings were constitutional; (2) the proposed acquisition is within the statutory jurisdiction of the condemnor; (3) the condemnor's determination and findings were made in accordance with relevant provisions of the Eminent Domain Procedure Law and the Environmental Conservation Law; and (4) the proposed acquisition will serve a public use, benefit or purpose (*Pizzuti v Metropolitan Transit Authority*, 67 NY2d 1039, 1041; *Congregation Gates of Prayer of Far Rockaway v New York City School Constr. Auth.*, 286 AD2d 439). Petitioners argue that the proposed taking should be barred because the benefit inures to a private party, viz. The New York Times. They also allege a taking in violation of due process protections of the state and federal constitutions on the ground that the UDC itself created any "blight" which justifies condemnation since the UDC made it impossible for the owners to reap the value of their land during the last twenty years. Notably, petitioners do not seek judicial relief on either the second or third statutory grounds, so we proceed on the assumptions that the proposed acquisition is within the statutory jurisdiction of the UDC and that the UDC has otherwise complied with relevant provisions of the Eminent Domain Procedure Law and the Environmental Conservation Law. A review of the procedural history preceding this action is necessary to understand the context in which petitioners raise their alternate claims of insufficient public use and inordinate delay in effecting condemnation.

Since 1968, the UDC has been authorized to acquire any real property pursuant to the Eminent Domain Procedure Law if it finds that such acquisition would be necessary or convenient for its purposes (McKinney's Uncons Laws of NY § 6263). Based on legislative findings that many existing industrial, manufac-

turing and commercial facilities in New York's urban areas have become obsolete, dilapidated or underutilized and that such conditions contribute to a wide range of social problems, the UDC was created to engage in a variety of activities to facilitate the acquisition, construction, reconstruction, rehabilitation or improvement of industrial, manufacturing and commercial facilities (McKinney's Uncons Laws of NY § 6252). When considering land use improvement projects, the UDC is required to find that: (1) the proposed project site is substandard or unsanitary and impairs sound growth and development; (2) there is a plan for clearance, replanning, reconstruction and rehabilitation of that area; and, (3) the plan affords maximum participation by private enterprise (McKinney's Uncons Laws of NY § 6260[c]). The real estate involved here, denominated Site 8 South, fronts on Eighth Avenue from 40th to 41st Streets, running halfway toward Seventh Avenue. Petitioners own separate portions of Site 8 South.

The UDC began involvement with redeveloping Times Square with its execution of a memorandum of understanding in 1980 followed by a general project plan in 1984. The New York City Board of Estimate authorized development of sites later that year based on UDC plans to develop the West 42nd Street area to overcome blight, physical and economic decay, and crime and frightening street life. The Court of Appeals upheld UDC's exercise of eminent domain power when community residents, area businesses and property owners challenged various aspects of these plans (*Jackson v Urban Development Corp*, 67 NY2d 400).

The 42nd Street Development Land Use Improvement Project aimed at revitalization of approximately 13 acres of land in the Times Square area of midtown Manhattan. The earliest redevelopment plans called for a retail mart on Site 8 with a pedestrian bridge to the Port Authority terminal. Empire State Development Corporation (ESDC), a subsidiary of UDC, has carried out

the project in successive stages: (1) taking title to nine acres in 1990; (2) acquiring Site 7 in 1994; and (3) acquiring Site 8 East in 1995. Site 8 South and Site 8 North remain the last privately held sites in this project's area. Revised plans in 1994 deferred the retail mart while entertainment and tourism were developed on Site 8 North, on Eighth Avenue between 41st and 42nd Streets. Negotiations between ESDC and The New York Times began in late 1999 and produced a memorandum of understanding in June 2000 which contemplated that ESDC would condemn Site 8 South and lease it to the Times. A high rise office tower would be built at Site 8 South providing the Times with a new headquarters, as well as providing 700,000 square feet of space for other office tenants. The tower would additionally include condominiums, a new subway entrance, mandatory ground-floor public amenities, a 350-seat auditorium, a gallery and retail space. Witnesses at a public hearing conducted by ESDC in 2001 testified that this project would keep the Times headquartered in Times Square, add needed office space, create employment, increase retail revenue, attract further economic improvement to the larger area, and address a critical shortage of commercial space. Other testimony detailed how the proposal would provide a needed spur to Eighth Avenue development by linking the renovated Penn Plaza in the 30s with the Worldwide Plaza in the 50s. Other witnesses testified that much of the original blighted condition of the Site 8 South area remained unchanged during the past two decades. The businesses in the site include five adult entertainment centers and low-end retail and food establishments. An active street drug trade persists.

Project opponents contended that urban blight had been virtually eliminated in the project area. Alternatively, to the extent that urban blight remained, opponent witnesses claimed that private development had been effectively precluded due to the potential for condemnation which had existed for twenty

years.

The eminent domain power does not originate in the constitution but is a "necessary attribute of sovereignty . . . . The power of eminent domain is the right of the State, as sovereign, to take private property for public use upon making just compensation" (*People v Adirondack Railway*, 160 NY 225, 236-237, *affd* 176 US 335). Of the two limitations on the exercise of this power, only public use is at issue here. Exercise of the eminent domain power cannot be for the sole benefit of a private party (*Thompson v Consolidated Gas Utilities Corp*, 300 US 55). Public use only requires "an evident utility on the part of the public" (*Bloodgood v Mohawk & H.R.*, 18 Wend 9). While a public benefit or use must be present, it is "broadly defined" and our review on this point is limited to ascertain whether the project is rationally related to a conceivable public purpose (*Vitucci v New York City School Constr. Auth.*, 289 AD2d 479, 481; *Fisher v Urban Development Corp*, 287 AD2d 262, 263; *Greenwich Associates v Metropolitan Transportation Auth*, 152 AD2d 216, 219, *appeal dismissed* 75 NY2d 865). The scope of our review is necessarily narrow since this exercise of the eminent domain power is a legislative function (*Kaskel v Impellitteri*, 306 NY 73, 80, *cert denied* 347 US 934; *New York City Housing Auth v Muller*, 270 NY 333, 339). A separate constraint is a consequence of our review of a determination made after a hearing. The ESDC "public purpose" determination must be affirmed if there exists "substantial evidence" in the hearing record (*Jennings v New York State Office of Mental Health*, 90 NY2d 227, 239). Petitioners could only prevail in this proceeding if they demonstrated that the determination is not rationally related to a conceivable public purpose (*Waldo's Inc. v Village of Johnson City*, 74 NY2d 718, 720; *Jackson v New York State Urban Development Corp*, 67 NY2d 400, 420-421; *East Thirteenth Street Community Assn v New York State Urban Development Corp*, 189 AD2d 352, 359, *affd* 84 NY2d

287).

Petitioners have not sustained their burden of showing that the challenged determination is without foundation (*see, Sunrise Props. v Jamestown Urban Renewal Agency*, 206 AD2d 913, *lv denied* 84 NY2d 809). The record shows that "the exercise of the eminent domain power is rationally related to a conceivable public purpose" (*see, Hawaii Housing Auth v Midkiff*, 467 US 229, 241), that purpose being the further reduction of the blight that has long pervaded the subject area (*see, Rosenthal & Rosenthal v New York State Urban Development Corp*, 771 F2d 44, 46, *cert denied* 475 US 1018). Given the breadth with which public use is defined in the condemnation context (*see, Matter of Fisher v Urban Development Corp*, 287 AD2d 262, 263), we find that a public purpose is dominant, warranting confirmation of the challenged determination, even though a private entity will benefit substantially from its involvement in the project (*see, Matter of Waldo's, Inc v Village of Johnson City*, 74 NY2d 718, 721). We are unpersuaded by petitioners' unsubstantiated assertion that the goals of the urban renewal plan have been achieved (*see, Jo & Wo Realty Corp v City of New York*, 157 AD2d 205, 218, *affd* 76 NY2d 962). Virtually all of the anticipated outcomes of this project clearly serve a public purpose by eliminating a pernicious blight which has impaired the economic development of a midtown Manhattan neighborhood. That a private business may obtain substantial benefits does not call into question the use of eminent domain and, under the circumstances, a statutory purpose of the UDC has been furthered. Petitioners' claim that restrictions placed by respondent UDC upon their use of the subject property have amounted to takings without due process is without merit, since respondents have not deprived any petitioner of the use and enjoyment of its land for a period of indefinite duration (*cf., Jensen v City of New York*, 42 NY2d 1079, 1080-1081). The record is devoid of evidence which would support petitioners'

conclusory allegations that the long-standing prospect of condemnation barred them from ameliorating or eliminating the persistent urban blight in the project area. We have considered petitioners' remaining arguments in opposition to the challenged determination and find them unavailing.

Accordingly, the determination and findings of respondent New York State Urban Development Corporation, issued on or about November 30, 2001, which directed that respondent Empire State Development Corporation exercise its power of condemnation in order to acquire, as necessary, real property designated Site 8 South within the 42nd Street Project, should be confirmed, the applications brought pursuant to Eminent Domain Procedure Law § 207 denied and the petitions dismissed, without costs or disbursements.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 20, 2002

/s/ CATHERINE O'HAGAN WOLFE
CLERK

APPENDIX C

Pertinent Excerpts From the Original Petition Filed in the Supreme Court of the State of New York, Appellate Division, First Department

FIRST CAUSE OF ACTION

35. Petitioners repeat and reallege paragraphs 1 through 34 above as though fully set forth herein.

36. By making it impossible for petitioners and other landowners in Site 8 South to develop their properties for a period of more than two decades, the respondents have deprived the petitioners of property without due process of law and have taken the petitioners' property without just compensation in violation of Article 1, Sections 6 and 7 of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the United States Constitution.

37. As sought to be applied in the present case, a statutory scheme that would permit the condemnation of petitioners' property to proceed after such a protracted and arbitrary interference with petitioners' property rights would violate Article 1, Sections 6 and 7 of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the United States Constitution.

38. Therefore, the Determination and Findings under review should be rejected, annulled, and set aside pursuant to Section 207(C)(1) of the EDPL because the proceeding herein was not in conformity with the federal and state constitutions.

SECOND CAUSE OF ACTION

39. Petitioners repeat and reallege paragraphs 1 through 38 above as though fully set forth herein.

40. Respondents' finding that the proposed condemnation of Site 8 South will serve the public purpose of eliminating "blight" is a transparent pretext. In fact, as the record shows, and as the respondents do not deny in their Determination and Findings under review, the petitioners would already have developed Site 8 South, thereby eliminating any residual "blight" therein, but for the unconstitutional refusal of the respondents to permit them to do so.

41. The pretextual nature of the respondents' finding that the proposed condemnation is necessary to eradicate "blight" is further revealed by the fact that, from 1994 until 2001, the respondents' publicly avowed position was that there might be no need to take Site 8 South at all.

42. The undisputed facts in the record – including, but not limited to, the respondents' refusal to consider offers from the petitioners and other developers – overwhelmingly show that the predominant purpose of the respondents in proposing to condemn Site 8 South is not to serve any public purpose, but instead to serve the private financial interests of the New York Times, a private financial corporation with billions of dollars in assets and annual revenues.

43. Under Article 1, Section 7 of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the United States Constitution, the power to condemn private property can only be exercised in situations where the dominant purpose of the condemnation is a public purpose, and any private benefit is only incidental. In the present case, the reverse is true.

44. Therefore, the Determination and Findings under review should be rejected, annulled, and set aside pursuant to Section 207(C)(4) of the EDPL because the proposed acquisition will not serve a public use.